

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KURT JEFFREY ANGELONE,) CASE NO. C09-1103-MJP
Petitioner,)
v.) REPORT AND RECOMMENDATION
PATRICK GLEBE,)
Respondent.)
_____)

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Kurt Jeffrey Angelone proceeds *pro se* in this 28 U.S.C. § 2254 habeas action.

16 He is in custody pursuant to a 1997 conviction by guilty plea on one count of attempted first
17 degree murder. (Dkt. 18, Ex. 1.) In pleading guilty, petitioner admitted he committed the act
18 of first degree murder by stabbing the victim and stipulated he was a persistent offender for
19 purposes of Washington's Persistent Offender Accountability Act. (*Id.*, Exs. 3 & 4.)
20 Snohomish County Superior Court sentenced petitioner, as a persistent offender, to life
21 imprisonment without the possibility of parole. (*Id.*, Dkt. 5.)

Petitioner raises a number of different grounds for relief in his habeas petition. (Dkt. 7;

01 Dkt. 21 at 9.) Respondent filed an answer to the petition with relevant portions of the state
02 court record. (Dkts. 17 & 18.) Respondent argues that the Court need not determine whether
03 petitioner properly exhausted his available state court remedies because his petition is untimely
04 under the federal statute of limitations, 28 U.S.C. § 2254(d). Petitioner objects to respondent's
05 arguments in a reply (Dkt. 21) and seeks leave to conduct limited discovery and a temporary
06 stay (Dkt. 14).¹

07 The Court has reviewed the record in its entirety. For the reasons discussed below, the
08 Court agrees with respondent that this action is time-barred, and recommends that petitioner's
09 motion to conduct discovery and for a stay be denied, and that the petition be denied and this
10 action dismissed.

11 Petitioner did not appeal his January 17, 1997 judgment and sentence. (See Dkt. 7 at
12 2.) Over nine years later, in February 2006, petitioner filed a personal restraint petition in the
13 Washington Court of Appeals. (Dkt. 18, Ex. 5.) The court dismissed the petition as
14 time-barred under RCW 10.73.090. (*Id.*, Ex. 13.) Petitioner sought review by the
15 Washington Supreme Court. (*Id.*, Ex. 14.) The Commissioner of the Supreme Court denied
16 review, agreeing that the petition was untimely. (*Id.*, Ex. 16.) The Supreme Court
17 subsequently denied a motion to modify the Commissioner's ruling, and the Court of Appeals
18 issued a certificate of finality. (*Id.*, Exs. 17-19.)

19 Petitioner filed a second personal restraint petition in April 2008. (*Id.*, Ex. 20.)
20 Again, the Court of Appeals dismissed the petition as time-barred and the Commissioner of the
21

22 1 Petitioner also filed a motion for an extension of time to submit his reply. (Dkt. 20.) This
motion is hereby STRICKEN as moot given that plaintiff timely submitted his reply.

01 Supreme Court agreed with the lower court and denied review. (*Id.*, Exs. 23-25.) The
02 Supreme Court also denied petitioner's motion to modify the Commissioner's ruling and the
03 Court of Appeals, in April 2009, issued a certificate of finality. (*Id.*, Exs. 26-28.)

04 Pursuant to 28 U.S.C. § 2244(d)(1), a one-year statute of limitations applies to § 2254
05 habeas actions. That period of limitation commences as follows:

06 (1) A 1-year period of limitation shall apply to an application for a writ
07 of habeas corpus by a person in custody pursuant to the judgment of a State
court. The limitation period shall run from the latest of-

08 (A) the date on which the judgment became final by the conclusion of
09 direct review or the expiration of the time for seeking such review;

10 (B) the date on which the impediment to filing an application created
11 by State action in violation of the Constitution or laws of the United
States is removed, if the applicant was prevented from
filing by such State action;

12 (C) the date on which the constitutional right asserted was initially
13 recognized by the Supreme Court, if the right has been newly recognized
by the Supreme Court and made retroactively applicable to cases on
collateral review; or

14 (D) the date on which the factual predicate of the claim or claims
15 presented could have been discovered through the exercise of due
diligence.

16
17 28 U.S.C. § 2244(d)(1).

18 In this case, the statute of limitations began to run on the date on which the judgment
19 became final through the conclusion of direct review or the expiration of time for seeking direct
20 review. § 2244(d)(1)(A). The period of direct review ordinarily includes the ninety-day
21 period in which a petitioner may file a petition for writ of certiorari with the United States
22 Supreme Court, whether or not the petitioner actually files such a petition. *See Bowen v. Roe,*

01 188 F.3d 1157, 1159 (9th Cir. 1999); *see also* Sup. Ct. Rule 13(1). However, if a petitioner
02 fails to seek direct review from the highest state court, the conviction becomes final when the
03 time for seeking such review elapses. *Wixom v. Washington*, 264 F.3d 894, 897-98 (9th Cir.
04 2001). In Washington, a notice of appeal must be filed within thirty days after the entry of the
05 decision of the trial court. Wash. RAP 5.2(a). Accordingly, the end of this thirty day period
06 marks the expiration of the time for seeking review pursuant to § 2244(d)(1)(A). *Wixom*, 264
07 F.3d at 898.

08 The Washington Court of Appeals issued its decision on January 17, 1997. (Dkt. 18,
09 Ex. 1.) The time for filing a notice of appeal expired thirty days later, on February 17, 1997.
10 Wash. RAP 5.2(a). Because petitioner did not file an appeal, his judgment and sentence
11 became final no later than February 17, 1997. *Wixom*, 264 F.3d at 897-98. The statue of
12 limitations began to run as of that same date. It ran for 365 days and expired in February 1998
13 – more than eleven years before petitioner filed his federal habeas corpus petition in August
14 2009.

15 The one year limitations period is tolled for any properly filed collateral state challenge
16 to the pertinent judgment or claim. 28 U.S.C. § 2244(d)(2). However, in this case, petitioner
17 did not file a personal restraint petition until February 2006. (Dkt. 18, Ex. 5.) Because the
18 statute of limitations had expired in February 1997, some nine years earlier, the personal
19 restraint petition did not toll the statute of limitations.

20 The statute of limitations is also subject to equitable tolling. *Laws v. Lamarque*, 351
21 F.3d 919, 922 (9th Cir. 2003). The Ninth Circuit has made clear that equitable tolling is
22 available “only when extraordinary circumstances beyond a prisoner’s control make it

01 impossible to file a petition on time and the extraordinary circumstances were the cause of his
02 untimeliness.” *Id.* (internal quotation marks and quoted source omitted). In other words,
03 equitable tolling may be appropriate when external forces, rather than petitioner’s lack of
04 diligence, prevent timely filing. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).

05 Here, petitioner argues, *inter alia*, that he was coerced into pleading guilty, that his
06 imprisonment is a fundamental miscarriage of justice, and that he is innocent. However, even
07 assuming they could provide a basis for equitable tolling in this case, petitioner failed to
08 provide sufficient support for these contentions. Nor does petitioner otherwise demonstrate
09 extraordinary circumstances beyond his control inhibiting his ability to timely pursue his claims
10 and entitling him to the equitable tolling of the federal statute of limitations.

11 Because petitioner filed his petition outside of the § 2254 statute of limitations period,
12 and because petitioner has not demonstrated that he is entitled to either statutory or equitable
13 tolling of the limitations period, his petition is time-barred. There is no basis for plaintiff’s
14 request for discovery, a temporary stay, or an evidentiary hearing. The Court, therefore,
15 recommends that plaintiff’s motion for discovery and a stay (Dkt. 14) be DENIED and that
16 petitioner’s federal habeas petition be DENIED and this case DISMISSED, without an
17 evidentiary hearing and with prejudice, pursuant to 28 U.S.C. § 2244(d). A proposed order
18 accompanies this Report and Recommendation.

19 DATED this 18th day of November, 2009.

20 

21 Mary Alice Theiler
22 United States Magistrate Judge